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IN THE

Supreme Court of the United States

OCTOBER TERM 1959

No. 353

JOSEPH BEDAMI,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, STATE OF FLORIDA

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TO THE HONORABLES, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

JOSEPH BEDAMI, the petitioner herein, prays that a Writ of Certiorari be issued to review the final judgment and decree of the District Court of Appeal, Second District, of the State of Florida entered in Case No. 964 in that court, entitled, JOSEPH BEDAMI, Appellant, v. STATE OF FLORIDA, Appellee, denying a

Petition for a Writ of Certiorari to the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, rendered on April 29, 1959, the final judgment and decree of the latter court having affirmed the judgment and sentence of the Criminal Court of Record in and for Hillsborough County, Florida. At the trial of this cause the jury returned a verdict of guilty under the first count of the Information and a verdict of not guilty under the second count of the said Information. The trial judge, under the first count, which charged that petitioner did unlawfully conspire, combine, confederate and agree to commit the offense of grand larceny, sentenced petitioner to be confined in the County Jail in and for Hillsborough County, Florida, for a term of one (1) year, which was the maximum provided by statute. (Tr. 20).

OPINIONS BELOW.

The opinion of the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, has not been published in any official or unofficial report, but appears on pages 21-23 of the Transcript of Record, and on pages 17-20 of Appendix "A".

The opinion of the District Court of Appeal, Second District, State of Florida, appears in APPENDIX "A", pages 24-39, pages 27-39 of the Transcript of Record and is reported in the case of *Bedami v. State*; So. 2nd.

JURISDICTION

Opinion, judgment and decree of the District Court of Appeal, Second District, State of Florida, was rendered and entered on April 29, 1959. (Tr. 27; App. "A" p. 24).

Timely application for rehearing was denied on June 1, 1959 (Tr. 49; App "A" p. 47).

On application of petitioner, the said District Court of Appeal, on the 1st day of June, 1959, granted a stay of mandate to enable petitioner to apply for a Writ of Certiorari to this Honorable Court, said stay being for 90 days (Tr. 50; App. "A" p. 51).

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257 (3), which provides in part:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> "By writ of certiorari, * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution, * * * or statutes of * * * the United States."

The following cases are believed to sustain the jurisdiction of this Court:

People of State of New York v. Zimmerman, 278 U.S. 63, 49 S. Ct. 61, and cases cited therein;

Chicago, B & Q. R. Co. v. City of Chicago, 166 U.S. 226, 17 S. Ct. 581.

The District Court of Appeal, Second District, State of Florida, is the Court of last resort for appeals from misdemeanor convictions in the Criminal Court of Record in and for Hillsborough County, Florida.

QUESTIONS PRESENTED FOR REVIEW

QUESTION NO. 1

DID THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, STATE OF FLORIDA, BY ITS FAILURE TO GRANT PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY, WHICH LATTER COURT AFFIRMED THE JUDGMENT AND SENTENCE OF THE TRIAL COURT, WHICH TRIAL COURT DENIED PETITIONER COMPULSORY PROCESS FOR THE ATTENDANCE OF A WITNESS ON HIS BEHALF BY DENYING PETITIONER'S APPLICATION FOR A SUBPOENA DUCES TECUM TO COMPEL THE ATTENDANCE OF A WITNESS IN HIS FAVOR AND THE PRODUCTION OF STENOGRAPHIC NOTES AND A TRANSCRIPTION THEREOF OF A STATEMENT UNDER OATH MADE BY THE STATE WITNESS, ANGELO TRAINA, UPON WHOSE TESTIMONY THE STATE RELIED HEAVILY FOR CONVICTION, WHEN THE APPLICATION FOR SUBPOENA AND THE WITNESSES' TESTIMONY DISCLOSED THAT SAID WITNESS HAD MADE A PRIOR STATEMENT UNDER OATH; THAT SAID STATEMENT WAS MATERIAL TO AND CONCERNING THE MATTERS ABOUT WHICH SAID WITNESS TESTIFIED FOR THE STATE IN CHIEF, AND THAT PETITIONER HAD BEEN INFORMED AND BELIEVED THAT SAID PRIOR STATEMENT WAS DIFFERENT FROM AND IN MATERIAL CONFLICT WITH THE TESTIMONY SAID WITNESS GAVE AT THE TRIAL, THEREBY DENYING PETITIONER COMPULSORY

PROCESS FOR THE ATTENDANCE OF HIS WITNESS IN DEROGATION OF HIS RIGHTS UNDER SECTION 11 OF THE DECLARATION OF RIGHTS OF THE FLORIDA CONSTITUTION AND UNDER THE SIXTH AMENDMENT TO THE FEDERAL CONSTITUTION, AS WELL AS HIS RIGHTS TO DUE PROCESS OF LAW AND EQUAL PROTECTION OF LAW AS GUARANTEED AND PROTECTED BY THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provisions involved are the Fourteenth Amendment to the United States Constitution, which, inter alia, provides:

> " • • • nor shall any State deprive any person of life, liberty, or property, without due process of law • • • ."

and Section 11 of the Declaration of Rights of the Florida Constitution, which, inter alia, provides that in all criminal prosecutions the accused:

> " • • • shall • • • have compulsory process for the attendance of witnesses in his favor • • • ."

The Florida Statute relative to the method of prosecution: Section 32.18, F.S.A. (App. "B" 1).

STATEMENT OF THE CASE

Petitioner was jointly charged with CIRO BEDAMI in a two count information in the Criminal Court of Record of Hillsborough County, Florida, with conspir-

acy to commit grand larceny and the substantive offense of grand larceny itself (Tr. 1-2; App. 1-2).

In the trial of the case, the State called as a witness one ANGELO TRAINA. The pertinent portions of his testimony appears on pages 8-9 of the Transcript of Record, (App. "A" 9-16). The State relied heavily upon the testimony of Traina to convict petitioner. In fact, it is extremely doubtful that a conviction could have been secured without his testimony. When the witness Traina was tendered to defense counsel for cross-examination, petitioner filed in the Criminal Court of Record a sworn application for a subpoena duces tecum, seeking to compel the production of the stenographic notes and transcription thereof of testimony previously given by the witness Traina concerning this case before the County Solicitor, while the Solicitor was acting in an official investigation, inquisitorial in nature, to determine whether or not the charges embraced in the pending information should be filed against the petitioner. Said application for subpoena duces tecum was presented to the trial Court and the proceedings had thereon appear on pages 5 through 14 of the Transcript of Record; pages 10 through 16 of Appendix "A".

The application was sworn to by the petitioner and his co-defendant and set out in substance that the witness Traina had, prior to the filing of the pending information, appeared before the County Solicitor, in an official investigation, inquisitorial in nature, where the said Solicitor was acting in effect as a one-man grand jury determining whether to file the pending information against petitioner. That said witness had testified before the Solicitor to matters material to and covering and touching on the subject matter of his testimony in chief. That said testimony was taken

down stenographically and transcribed, and was then in the possession of the Solicitor, his assistants, reporters, secretaries, or other employees. The petitioner had been informed by some people who had talked to the witness Traina, subsequent to his giving testimony before the Solicitor and prior to his testimony at the trial, that Traina had said in effect that the testimony he gave the Solicitor and the testimony he would give at the trial would be different and in conflict. That it was essential to the administration of justice and in order that the petitioner may be enabled to properly cross-examine the witness Traina and to lay the proper predicate for impeachment of the said witness, in the event his statement before the Solicitor was in fact substantially in conflict with his trial testimony, that he have said testimony. That the denial of said application would deprive the petitioner of his rights secured under Section 11 of the Declaration of Rights to the Florida Constitution to have compulsory process for the attendance of witnesses in his favor, as well as his rights to due process of law and equal protection of the law as guaranteed and protected by the Fourteenth Amendment to the Federal Constitution and his rights as set out in the cases of *Vann v. State*, 85 So. 2d 133; *State ex rel. Brown v. Dewell*, 133 Fla. 785, 167 So. 687; *United States v. Aaron Burr*, Fed. Cas. No. 14,692d; *Trafficante v. State*, 92 So. 2d 806 and *Trafficante v. State*, 92 So. 2d 811.

Immediately prior to the presentation of the application for compulsory process to the Trial Court, the witness Traina testified on direct examination that he had been subpoenaed before the Solicitor as a witness prior to the filing of the information against this petitioner on two occasions, to-wit: April 18, 1957, and July 9, 1957, (Tr. 9; App. "A" 9). Said witness's name

also appeared, as set out in the sworn application for subpoena, on the back of the information as one of the witnesses upon whose testimony said information was based. (Tr. 1 through 2; App. "A" 3). No denial, traverse or other challenge was made by the State to the showing set forth in petitioner's sworn application for the subpoena. It therefore stood, in legal contemplation, admitted before the Trial Court. The *Trial Court arbitrarily overruled and denied petitioner's application for compulsory process without even pausing to examine the sought after testimony to determine whether or not it was in fact capable of being used to impeach or explain any or all of the testimony of the said witness Traina.*

Following his conviction, petitioner duly filed Motion for New Trial, the third ground of which expressly preserved and pursued the State and Federal Constitutional question presented in this Petition for a Writ of Certiorari (Tr. 15-16; App. "A" 16).

After sentence (to the maximum) petitioner duly perfected his appeal to the Circuit Court of Hillsborough County, Florida and the third assignment of error in that Court again expressly preserved and pursued the Federal Constitutional question presented in this Petition for a Writ of Certiorari (Tr. 17; App. "A" 17).

Following an adverse decision by the Circuit Court, petitioner duly filed his Petition for Rehearing wherein it was again pointed out that the denial of petitioner's application for compulsory process violated his Federal Constitutional rights (Tr. 24-26; App. "A" 20-23).

On denial of his Petition for Rehearing (Tr. 26A; App. "A" 23), petitioner duly perfected his Petition for a Writ of Certiorari to the District Court of Appeal, Second District, State of Florida.

Following the adverse decision of the District Court of Appeal, Second District, State of Florida, petitioner duly filed his Petition for Rehearing where it was again pointed out that the denial of petitioner's application for compulsory process violated his Federal Constitutional rights under the Fourteenth Amendment to the Federal Constitution (Tr. 40-45; App. "A" 40-46).

On denial of his Petition for Rehearing (Tr. 49; App. "A" 47), petitioner duly perfected his Petition for a Writ of Certiorari to this Honorable Court (Tr. 50; App. "A" 51).

FEDERAL QUESTION IN THE COURTS BELOW

A. In The Trial Court.

The protection of the Fourteenth Amendment is expressly invoked in ground 3 of the Motion for New Trial which reads as follows (Tr. 15; App. "A" 16):

> "3. The Court erred in denying and overruling defendant's sworn application for a Subpoena Duces Tecum to be directed to Paul B. Johnson, his assistants, reporters, secretaries or other employees who had possession of the stenographic notes and transcription thereof of the testimony of the State Witness, Angelo Traina, as given before the County Solicitor or his assistant when the said Solicitor, or his assistant, was acting as a one man grand jury investigating the charges against these defendants embraced in the pending information; and the Court thereby denied these defendants their right to compulsory process for the attendance of

witnesses on their behalf in violation of the defendants' constitutional right to compulsory process under the constitution of the State of Florida as well as denied these defendants equal protection of the law and due process of law as guaranteed and protected by the Fourteenth Amendment to the Federal Constitution."

B. In The Circuit Court of The Thirteenth Judicial Circuit in and For Hillsborough County, Florida.

Petitioner continued to press the federal question on appeal by his formal assignments of error. The pertinent assignment is (Tr. 17; App. "A" 17):

" 3. The Trial Court erred in denying and overruling defendant's sworn application for a Subpoena Duces Tecum to be directed to Paul B. Johnson, his assistants, reporters, secretaries or other employees who had possession of the stenographic notes and transcription thereof of the testimony of the State Witness, Angelo Traina, as given before the County Solicitor or his assistant when the said Solicitor, or his assistant, was acting as a one man grand jury investigating the charges against this defendant embraced in the pending information; and the Court thereby denied this defendant his right to compulsory process for the attendance of witnesses on his behalf in violation of defendant's constitutional right to compulsory process under the constitution of the State of Florida as well as denied this defendant equal protection of the law and due process of law as guaranteed and protected by the Fourteenth Amendment to the Federal Constitution.

C. In The District Court of Appeal, Second District, State of Florida.

That the District Court of Appeal, passed upon the Federal Question, here presented, is further evidenced by the fact that the petitioner filed in that court, and that court granted, an application for stay of Mandate to enable petitioner to make this application to the Court. Said application appears in Appendix "A", pages 47 through 50; and shows upon its face that it was based upon the asserted denial of petitioner's right to due process of law under the Fourteenth Amendment to the Federal Constitution, by virtue of the District Court of Appeal's denial of petitioner's Petition for a Writ of Certiorari to the Circuit Court in and for the Thirteenth Judicial Circuit, State of Florida, which in effect, affirmed the trial court's denial of petitioner's application for a subpoena duces tecum to compel the attendance of a witness in his behalf.

On timely application for rehearing, petitioner again invoked the protection of the Fourteenth Amendment, on pages 4 and 5 of his Petition the following appears (Tr. 44-45; App. "A" 45):

> " In denying petitioner's Petition for Certiorari, this Court overlooked and failed to consider the fundamental law that the failure of the Trial Judge to apply a correct principle of law to an admitted state of facts deprives the litigant of 'remedy by due course of law' or 'due process of law' which terms the Courts hold to be synonymous. As seen above, the facts forming the foundation for the issuance of the subpoena duces tecum applied for by petitioner stand admitted, untraversed and unchallenged. Under this condition it follows that the Trial Court's failure to apply the law as laid down by the Brown, Trafficante, Burr and Vann cases, above cited, denied this petitioner 'remedy by due course of law' and equal protection of the

law and due process of law as guaranteed and protected by the Florida Constitution and the 14th Amendment to the Federal Constitution. See page 3 of this Court's opinion of April 29th, 1959, wherein this Court said:

> ' In Mathews v. Metropolitan Life Insurance Co., Florida, 1956, 89 So. 2nd 641, it is stated that the duty of the Trial Judge to apply a correct principle of law to admitted facts is such a fundamental and essential element of the judicial processes that a litigant cannot be said to have had the "remedy by due course of law" guaranteed by D.R. Section 4, if he fails or refuses to perform that duty.'

It therefore follows, as night follows the day, that the Trial Court's denial of petitioner's Application for Subpoena Duces Tecum, and the Circuit Court's affirmance of said denial, and this Court's denial of petitioner's Petition for Certiorari, under the admitted and uncontradicted facts disclosed by the record, are all in derogation of petitioner's rights under Sections 4 and 11 of the Declaration of Rights to the Florida Constitution, his right to compulsory process under the 6th Amendment to the Federal Constitution, and his right to due process of law and equal protection of the law as guaranteed and protected by the 14th Amendment to the Federal Constitution."

The District Court of Appeal, Second District, State of Florida, entered an order denying Petition for Rehearing as follows (Tr. 49; App. "A" 47):

> "Counsel for petitioner having filed in this cause a Petition for Rehearing and the same having been considered by the Court, it is ORDERED that the said Petition be and the same is hereby denied."

REASONS FOR GRANTING THE WRIT

As To Question 1

It is clear that the District Court of Appeal has decided a federal question. On page 3 of its opinion it expressly states this fact in these words (Tr. 29; App. "A" 27:

> "In Mathews v. Metropolitan Life Insurance Co., Florida, 1956, 89 So. 2d 641, it is stated that the duty of the Trial Judge to apply a correct principle of law to admitted facts is such a fundamental and essential element of the judicial processes that a litigant cannot be said to have had the 'remedy by due course of law' guaranteed by D.R. Section 4, if he fails or refuses to perform that duty."

At the outset, in order to clear the air of the confusion which surrounded this case in the District Court of Appeal and the Circuit Court, it might be well to state what this case is not about. This case does not involve an attempt by petitioner to compel the production of the private work products, memoranda, or statement of a witness taken by the Solicitor preparatory for trial. Petitioner concedes, as he always has, that he cannot compel the production of the statement of a witness before the Solicitor which was taken by the Solicitor preparatory to trying his case only, unless said statement is used by the Solicitor in the case.

What is involved in this case is whether or not a defendant in a criminal case prosecuted in the Criminal Court of Record on an information filed by the Solicitor has a Constitutional right, upon a proper application, to reach the prior official testimony of the witness

upon which the charge itself is based, where the defendant has reason to believe that said prior testimony of the witness is in material and substantial conflict with his Trial Court testimony. The fact that the Solicitor, in most cases in the Criminal Court of Record, serves as the indicting agency and also as the prosecutor at the trial, seems to create an air of confusion as to whether the testimony sought is the work product of the Solicitor or official testimony which is not privileged and which is subject to production where the defendant invokes his Constitutional right to compulsory process. We shall demonstrate to a moral certainty that the prior testimony of the witness sought in this case was his testimony under oath before the Solicitor, acting in his official capacity as an inquisitorial body or one-man grand jury, to determine whether or not the charges filed against petitioner should be filed and not any statement of the witness given to the Solicitor in preparation of his case for trial.

Petitioner's application for subpoena duces tecum set this fact up in affirmative terms. In addition thereto, the witness Traina's testimony shows positively that his prior testimony which petitioner sought with his subpoena was given before the Solicitor in the Solicitor's investigation into whether or not to file the pending charges against petitioner. ***His prior testimony could not have been taken preparatory to trial for the simple reason that when said testimony was given, no charges were pending against petitioner.*** The information against petitioner had not yet been filed and no case existed which the Solicitor could have been

preparing to try. See Angelo Traina's testimony, (Tr. 9-10; App. "A" 9):

"Q Now, Mr. Traina, *were you subpoenaed* to the County Solicitor's office on April 18, 1957, *to give testimony?*

"A Yes, sir.

"Q All right. Were you subpoenaed again to appear on July 9, 1957?

"A I think I was.

"Q Now, just before your second appearance in the office of the County Solicitor and *after you had already testified to us under oath in April,* did you have a phone call from Joe Bedami?

"A Yes, sir." (Emphasis supplied)

The record affirmatively shows that the pending information was not filed against petitioner until July 25, 1957, almost three weeks after the witness Traina's second appearance before the Solicitor in this case. See said Information, Pages 1-2 of the Transcript of Record, Appendix "A" page 3 where, at the conclusion of said Information, the following appears:

"Presented by Harry M. Hobbs, Acting County Solicitor, and filed this July 25, 1957.

"L. D. Simmons, Clerk of the Criminal Court of Record, Hillsborough County, Florida."

The witness Traina's testimony, the filing date on the information, and petitioner's application for subpoena duces tecum make it appear beyond question that

the prior testimony of the witness which petitioner sought was the testimony of the witness before the Solicitor in his official investigation, inquisitorial in nature, to determine whether to file the charges against petitioner and before said charges were filed, and consequently said testimony could not have been a mere statement of the witness taken by the Solicitor preparatory to trial.

In the Florida Counties having Criminal Courts of Record, every offense over which those Courts have jurisdiction (all felony cases save and except capital cases, and practically all misdemeanor cases as well) must be prosecuted upon information under oath filed by the County Solicitor. There are two foundations upon which a Solicitor may lawfully file an information in the Criminal Court of Record. One is upon sworn testimony taken before him, acting as it were as a one-man grand jury, which testimony he must certify to under oath as being sufficient, if believed, to sustain the charge; and the other is on an indictment duly returned by a grand jury of the County. In the latter case, the indictment itself takes the place of the sworn testimony of the witnesses before him. See Florida Statute 32.18, F.S.A., which provides as follows:

> "METHOD OF PROSECUTION; WORKS OF PLEADING AND PRACTICE.
>
> "(1) All offenses triable in the Criminal Courts of Record shall be prosecuted upon information, under oath, to be filed by the County Solicitor.
> "(2) The grand jury of the Circuit Court for the County in which a Criminal Court of Record is established may indict for offenses triable in the Criminal Court of Record.

"(3) Upon the finding of such indictment, the Circuit Judge shall commit or bail the accused for trial in the Criminal Court of Record, which trial shall be upon information filed by the County Solicitor.

"(4) Upon the finding of such indictment, the Circuit Judge or the Clerk of the Circuit Court upon direction of the Circuit Judge, shall certify such indictment and deliver the same to the Clerk of the Crimina. Court of Record or to the County Solicitor. Such indictment shall be sufficient basis for the filing of an information by the County Solicitor."

There can be no doubt that regardless of whether the information is based on a grand jury indictment or on sworn testimony before the County Solicitor, *there must be an official investigation where sworn testimony is taken sufficient to make a prima facie case before an information may be lawfully filed against the accused.* In the one instance, the grand jury conducts this official investigation and hears the testimony of the witnesses. In the other, the Solicitor replaces the grand jury and serves the same function. *The substitution of the Solicitor for the grand jury cannot change the fundamental nature of the proceeding nor can it change the fundamental nature of the testimony at said proceeding.*

The Supreme Court of Florida has expressly held that an accused, on a proper showing (on the same identical showing made in this case) is entitled as a matter of organic law to the State witness's testimony before the grand jury. It therefore follows, as night follows the day, that the accused, on a proper showing,

is entitled as a matter of organic law to the State witness's testimony before the County Solicitor in his official investigation where he is replacing the grand jury, for the reason that *the testimony of the witness before him in such an instance is of the same identical nature as the testimony before the grand jury, and his proceeding is of the same identical nature as a grand jury proceeding.*

The Supreme Court of Florida has on at least three occasions ruled that the defendant is entitled to the grand jury testimony of a State witness when he makes application for a subpoena duces tecum to reach said testimony in exactly the same manner followed in the case at Bar.

We think it clear that the trial court committed error in declining to issue the subpoena duces tecum and that the authorities directly controlling this proposition are (1) Section 11 of the Declaration of Rights of the Constitution of the State of Florida, (2) the case of *United States v. Aaron Burr,* 25 Fed. Cases 30, Number 14,692d, (3) the Supreme Court of Florida's own pronouncements in the cases of *State ex rel Brown et al v. Dewell, Judge,* 123 Fla. 785, 167 So. 687; *Trafficante v. State,* Fla., 92 So. 2d 811, and (4) the Fourteenth Amendment to the Federal Constitution.

Section 11 of the Declaration of Rights of the Florida Constitution provides that in all criminal prosecutions the accused "shall • • • have compulsory process for the attendance of witnesses in his favor." (App. "B" 2).

In the *Burr* case, supra, the defendant sought a subpoena duces tecum to reach a letter in the files of the President of the United States. General Wilkinson, who was the commanding general of the United States Army, had written a letter to President Jefferson which the defendant deemed would be material in his defense. In support of his motion for the subpoena, the defendant made the following affidavit material to the letter above mentioned:

> "Aaron Burr maketh oath, that he hath great reason to believe that a letter from General Wilkinson to the President of the United States, dated 21 October, 1806, as mentioned in the President's message of the 22 January, 1807, to both houses of congress, together with the documents accompanying the said letter, and copy of the answer of said Thomas Jefferson, or anyone by his authority, to the said letter, may be material in his defense, in the prosecution against him * * *".

The prosecution resisted the issuance of this subpoena duces tecum on the grounds, first, that it was unnecessary as certified copies of the communications could be received by the defense through proper channels. Second, that it was improper to call upon the President to produce the letter of General Wilkinson because it was a private letter and probably contained confidential communications which the President ought not and could not be compelled to disclose. Third, that the letter might contain state secrets which could not be divulged without endangering the National safety, and fourth, the prosecution argued that the documents demanded could not be material to the defense *and objected that the affidavit did not even state, in positive terms, that they would be material.*

After hearing argument on the question for two full days and part of the third Mr. Chief Justice Marshall rendered his decision that the subpoena ought to issue. The Court disposed of the Government's first contention that the Chief Executive of the United States was immune from the process of the court by pointing out that in this Country, as distinguished from those countries which have Kings, that the Chief Executive is subject to the law and process of the courts as much as any private citizen. It held that any person subject to a subpoena testificandum to be compelled to come into court and testify to facts within his knowledge was subject to a subpoena duces tecum, and held as follows:

> "If, in being summoned to give his personal attendance to testify, the law does not discriminate between the president and a private citizen, what foundation is there for the opinion that this difference is created by the circumstance that his testimony depends on a paper in his possession, not on facts which have come to his knowledge otherwise than by writing? The court can perceive no foundation for such an opinion. The propriety of introducing any paper into a case, as testimony, must depend on the character of the paper, not on the character of the person who holds it. *A subpoena duces tecum then, may issue to any person to whom an ordinary subpoena may issue, directing him to bring any paper of which the party praying it has a right to avail himself of testimony; if, indeed, that be necessary process for obtaining the view of such paper* * * *" (Emphasis supplied.)

The Court disposed of the Government's contention that the letters might contain some state secrets, with the statement that if such were the case it could be made so to appear on the return to the subpoena duces tecum.

That likewise, if said letters contained confidential communications between General Wilkinson and the President, which desired not to be made public and which were not relative to the defense, that the President could indicate on the return to the writ those portions and that the same need not be made public at the trial.

On the Government's contention that the affidavit in support of the application for subpoena duces tecum had to show affirmatively the materiality of the letter to the defense, the Court held as follows:

> "* * * * If it be apparent that the papers are irrelevant to the case, or for state reasons they cannot be introduced into the defense, the subpoena duces tecum would be useless. But if this be not apparent, if they may be important in the defense, if they may be safely read at the trial, would it not be a blot on the page which records the judicial proceedings of this country, if, in a case of such serious imports as this, the accused should be denied the use of them? The Counsel for the United States takes a very different view of the subject, and insists that a motion for process to obtain testimony should be supported by the same full and explicit proof of the nature and application of that testimony, which would be required on a motion, which would delay public justice, which would arrest the ordinary course of proceeding, or would in any other manner affect the rights of the opposite party. In favor of this position has been urged the opinion of one, whose loss as a friend and as a judge I sincerely deplore; whose worth I feel, and whose authority I shall at all times greatly respect. If his opinions were really opposed to mine, I should certainly revise, deliberately revise, the judgment I had formed; but I perceive no such opposition."

In conclusion the Court held as follows:

"The affidavit on which the motion is grounded has not been noticed. It is believed that such a subpoena, as is asked, ought to issue, if there exists any reason for supposing that the testimony may be material, and ought to be admitted. It is only because a subpoena is to those who administer the government of this country, that such an affidavit was required as would furnish probable cause to believe that the testimony was desired for the real purpose of defense, and not for such as this court will forever discountenance." (Emphasis supplied)

So that the Court, in the *Burr* case, supra, actually held that the application for the subpoena duces tecum must be granted and the subpoena issued, and that without any affirmative showing that the paper sought would really be material to the defense and simply upon an affirmation by the defendant that it was sought actually for bona fide purposes of the defense rather than in an attempt to discredit the President or the Government. *The Court further held that it was only because the subpoena went to the top Executive of the Government of the Country that such an affidavit even as that required was required.*

In the case of *Bridewell v. Aderhold,* D.C., Ga., 1935, 13 F. Supp. 253, wherein the District Court ruled that the petitioners, inter alia, where denied compulsory process for obtaining witnesses to testify in their behalf in derogation of their rights under the Sixth Amendment to the United States Constitution, it stated as follows:

"It will be observed that *the guaranty of* the right to assistance of counsel and *compulsory process for obtaining witnesses is contained in the same*

clause and expressed in substantially the same language as the guaranty of the right to trial by jury. The amendment guarantees this right to the accused 'in any criminal prosecution.' There is no limitation of these rights to cases where the accused is charged with a capital offense, as urged by respondent, and no reason appears in logic, morals, or humanity why an accused, in danger of deprivation of his life or liberty, should, in any criminal prosecution, be deprived of these rights by implication. *These are fundamental rights which the courts should safeguard with meticulous care and award to the accused,* whether requested or not, unless waived by him in a manner showing his express and intelligent consent.

"This seems to be established by the Supreme Court in the case of Patton v. United States, 281 U. S. 276, 50 S.Ct. 253, 263, 74 L.Ed. 854, 70 A.L.R. 263 * * *." (Emphasis supplied.)

The Fourteenth Amendment to the Federal Constitution provides that no State shall "deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"

We most respectfully submit that in denying petitioner's Petition for Certiorari, the District Court of Appeal overlooked and failed to consider the fundamental law that the failure of the Trial Judge to apply a correct principle of law to an admitted state of facts deprives the litigant of "remedy by due course of law" or "due process of law" which terms the Courts hold to be synonymous. As seen above, the facts forming the foundation for the issuance of the subpoena duces tecum applied for by petitioner stand admitted, untraversed and unchallenged. Under this condition it follows that the Trial Court's failure to apply the law as laid down by the Brown, Trafficante, Burr and Vann cases, above

cited, deined this petitioner "remedy by due course of law" and equal protection of the law and due process of law as guaranteed and protected by the Florida Constitution and the 14th Amendment to the Federal Constitution.

In the two *Trafficante* cases, supra, the Supreme Court of Florida reversed both cases for the refusal of the Trial Court to grant the appellants a subpoena duces tecum to reach the grand jury testimony of the main State witness against them. The writer of this brief prepared the applications for subpoena duces tecum in the Trafficante cases. The application in this case is precisely the same as the applications in the *Trafficante* cases, supra, with the necessary adjustments as to dates, names, times and places. The only difference being that the testimony in the *trafficante* cases was given before a grand jury instead of the County Solicitor, which is a distinction without a difference.

The applications in the *Trafficante* cases, supra, were presented by the writers of this brief to the Trial Court at precisely the same stage of the proceeding as was done in this case, to-wit, when the witness was tendered to defense counsel for cross-examination. It therefore follows that there can be no question but what the application in the case at bar was timely made at a stage of the proceedings that the Supreme Court of Florida has already approved of.

Nor can there be any question but what the application in the instant case made a sufficient showing and on appeal must be taken as proving the materiality of the testimony sought to the Trial Court testimony of the witness Traina. See *Trafficante v. State*, 92 So. 2d 811, text 814 and 815, where the Supreme Court of Florida held:

"The State contends, however, that these authorities do not compel the result sought by appellants because, in the State's view, the witness Dietrich's testimony before the grand jury was not material to the issues in this case, and the grand jury presentment or findings had not been made public at the time of the trial.

"We cannot accept the contention of the State herein. Appellants' sworn application for the subpoena, as we have stated, sets up the materiality of the evidence sought to be reached by the subpoena and must be taken for the purpose of this appeal as proving materiality to the extent necessary to warrant examination of the transcript by the court with a view to making final determination of its materiality. * * *"

The same identical allegations as to materiality were made in the instant case in the application for subpoena as was made in the *Trafficante* case, supra.

In the last cited case, the Supreme Court of Florida held:

"Appellants contend that they had a right to the issuance of the subpoena duces tecum to compel the court reporter to appear as a defense witness and to bring with her the transcript of the witness Dietrich's testimony as given before the Grand Jury, making same available to defense counsel in order that it might be utilized in cross-examination of the witness Dietrich. In support of their contention, appellants rely upon our opinions in Vann v. State, Fla., 85 So. 2d 133, and State ex rel. Brown v. Dewell, 123 Fla. 785, 167 So. 687, as well as the case of United States v. Aaron Burr, Fed. Cas. No. 14,692d. They also contend that they were denied their rights under the 14th Amendment to the Federal Constitution and Section 11 of the Declaration of Rights of the Florida Constitution, F.S.A., the latter of which provides that

in all criminal prosecutions the accused 'shall * * * have compulsory process for the attendance of witnesses in his favor.'

* * *

"The right of an accused in a criminal case to compulsory process for attendance of witnesses on his behalf, as we have seen, stems from the express terms of our constitution. This provision was inserted because of the fundamental unfairness which results from placing a man on trial on a criminal charge and denying him the means to compel the attendance of witnesses, within the jurisdiction of the court, who are in possession of material facts which show or tend to show his innocence of the charge.

"In State ex rel. Brown v. Dewell, supra, 167 So. 687, we held that an accused on trial is entitled to the issuance of a subpoena duces tecum to reach the testimony of a State's witness given before a grand jury when it is shown that such testimony is or may be material to the issues in the trial. In that case, in seeking to be informed as to the application of the rule, we reached back to the celebrated Aaron Burr case wherein Chief Justice Marshall stated in part:

> "'It is believed that such a subpoena, as is asked, ought to issue, if there exists any reason for supposing that the testimony may be material, and ought to be admitted.' 25 Fed. Cas. p. 38, No. 14,692d.

"Very recently, in Vann v. State, supra, 85 So. 2d 133, we had occasion to consider a related problem, and we held that it is the duty of the trial judge, on proper application, to examine documents sought to be subpoenaed, and to apply tests of relevancy or privilege which we there stated.

> in order that an enlightened ruling might be made upon the application. Such procedure was not followed in the instant case." (Emphasis supplied.)

As seen above, the Supreme Court of Florida held directly that the right of compulsory process for the attendance of an accused's witnesses stems from the express terms of our Constitution. This being so, there can be no question of the harmless error having any applicability to the case.

The Supreme Court of Florida quoted with approval in the *Trafficante* case, supra, from the celebrated *Burr* case, as follows:

> "It is believed that such a subpoena, as is asked, ought to issue, if there exists any reason for supposing that the testimony may be material, and ought to be admitted."

The Supreme Court of Florida has previously quoted with approval from the same *Burr* case in the *Dewell* case, supra. Under the *Trafficante* and *Vann cases*, there can be no doubt but what an affirmative duty devolved on the Trial Judge to examine the transcript of the witness Traina's testimony before the Solicitor to determine whether or not in fact it was material to the witness's trial testimony and whether it was capable of being used beneficially to the defense.

The *Trafficante*, *Vann*, *Burr* and *Dewell* cases, supra, are absolutely controlling of the instant case. There is and can be no real distinction between those cases and the case at Bar. It cannot be said that a man can be placed on trial in a criminal case and denied the right to call the only witnesses who may be of

assistance to him in his defense consistent with due process of law any more than it can be said that he can be placed on trial over his objection without a jury. The Constitutional right to compulsory process for the attendance of his witnesses stands on the same plane as the accused's right to a fair and impartial trial before a fair and impartial jury, his right to a speedy and public trial, his right to be heard by himself or his counsel, or both; to demand the nature and the cause of the accusation against him, and his right to meet the witnesses against him face to face. See *Patton v. United States*, 281 U. S. 276, 50 S.Ct. 253. No civilized conception of due process of law can be met when any of these fundamental organic rights are stripped from the defendant.

Nor can there be any reasonable classification of testimony taken before the County Solicitor, acting as a one-man grand jury, as against that taken before a grand jury itself in the same type of a case. Had the grand jury of Hillsborough County indicted this petitioner and that indictment had been certified to by the Solicitor and used as a basis for the filing of his information, there can be no doubt but what the Trafficante cases and the Dewell case would compel the production of the witness Traina's testimony as given before the grand jury.

We think it clearly beyond the power of the Solicitor to strip this petitioner and all others accused of criminal offenses in his jurisdiction of their Constitutional right to compulsory process in the circumstances of this case merely by filing a direct information against the accused. Any such construction of the Florida Statutes allowing this result clearly amends the

Constitution to read that the accused shall have compulsory process for the attendance of witnesses in his favor, to produce a State witness's prior testimony at the inquisitorial investigation, except where the County Solicitor conducts that investigation. Such a result is clearly in violation of the petitioner's fundamental Constitutional rights both under the Federal and Florida Constitutions.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Petition for Writ of Certiorari should be granted.

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